FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

CONCURRING OPINION

OF

CHAIRMAN SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD
COMMISSIONER JOHN WARREN MCGARRY

ADVISORY OPINION 1993-2

In Advisory Opinion 1993-2, the Commission determined by a vote of 5-1 that there is but one coordinated expenditure allowance when it comes to the Texas special election for United States Senate, even though a runoff election may be held. The undersigned based this decision on clear cut Commission regulations and materially indistinguishable advisory opinion precedent. We write this concurring opinion to explain our analysis and to express our disagreement with the stated rationale of certain of our colleagues.

I.

The Federal Election Campaign Act of 1971, as amended ("the Act"), limits the contributions and expenditures that may be made by party committees to or on behalf of candidates for federal office. One provision of the Act, 2 U.S.C. §441a(d) allows the national and state committees of the political parties to make so-called coordinated expenditures in connection with "the general election campaign" of the parties' candidates.

The Act further provides that these expenditures may not exceed certain dollar limitations. 2 U.S.C. §441a(d)(3).[1]

The State of Texas scheduled a special election for May 1, 1993 to elect an individual to the United States Senate. Candidates from all political parties, including any independents, competed in this election. If no candidate received a majority of votes, Texas law required that a runoff election be held between the top two vote-getters to determine who will hold the Senate seat until the next regularly scheduled election in 1994. The requestor in Advisory Opinion 1993-2 asked whether the coordinated expenditure limitation conferred "a single spending limitation on parties supporting candidates in a special election together with any runoff." Advisory Opinion Request 1993-2 at 1 (January 29, 1993) (emphasis in the original).

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1. Specifically, §441a(d) provides in pertinent part:

> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds --
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> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of --
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> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000. . . .

Congress specifically considered and rejected the proposition that party committees should not be limited in the amount of support they can give to candidates. See 120 Cong. Rec. S5411-15 (daily ed. Apr. 8, 1974), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974 (GPO 1977) at 417-21 (Senator Clark: "To permit unlimited expenditures would be a serious mistake."). Donors should not be able to undermine the contribution limits in the Act through gifts to the party committees. Though limits on federal account donations exist, contributors are able to make unlimited donations to party nonfederal accounts and are doing so with increasing frequency. See FEC Press Release, Mar. 11, 1993; see also Christian Science Monitor, "Give Money and They Call Back," Nov. 3, 1992. Thus, some brake on the spending of parties is needed, and §441a(d) is that brake.

The request was not merely academic. The national and state committee of each party could combine to spend up to $1,432,562 if one §441a(d) allowance exists, or up to $2,865,124 if two §441a(d) limits exist.

Commission regulations answer the question before us. The regulations at 11 C.F.R. §100.2(b) provide as follows:

> (b) General election. A general election is an election which meets either of the following conditions:
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> (1) An election held in even-numbered years on the Tuesday following the first Monday in November is a general election.
>
> (2) An election which is held to fill a vacancy in a Federal office (i.e., a special election) and which is intended to result in the final selection of a single individual to the office at stake is a general election. See 11 C.F.R. 100.2(f).

The Texas special election scheduled for May 1 was plainly a general election as defined by 11 C.F.R. 100.2(b)(2). Clearly, this election was "held to fill a vacancy in a Federal office" and was "intended to result in the final selection of a single individual to the office." 11 C.F.R. 100.2(b)(2). If a candidate won a majority, the election process was over.

By contrast, the runoff election in Texas would not qualify as a "general election" under 11 C.F.R. 100.2(b). Moreover, Commission regulations distinguish a "runoff election" from a "general election" by defining a runoff, inter alia, as "[t]he election held after a general election and prescribed by applicable State law as the means for deciding which candidate should be certified as an officeholder elect." 11 C.F.R. 100.2(d)(2) (emphasis added). See also 11 C.F.R. 100.2(f) ("A special election may be a primary, general or runoff election....") (emphasis added); 2 U.S.C. §431(1)(A) ("The term 'election' means a general, special, primary, or runoff election....") (emphasis added). Since the §441a(d) coordinated expenditure allowance only applies to the "general election campaign," and the Texas runoff, under Commission regulations, cannot be a general election, one could only conclude that an additional coordinated expenditure allowance under 2 U.S.C. §441a(d) is not allowed for the Texas runoff.

Our analysis in this Advisory Opinion is mandated also by the determination by the Commission in Advisory Opinion 1983-16, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5717. That opinion considered the application of §441a(d) to a special election in California where, if no candidate received a majority, a runoff election was held with the top vote getters in each political party or political body. The Commission held that the

California special election met the characteristics of a "general election" as set out in the regulations and, accordingly, allowed the party committee to make §441a(d) expenditures with respect to that election.[2] With respect to the possible runoff election, however, the Commission concluded that it was "not a separate or additional general election" under the regulations and, thus, not entitled to a separate or additional §441a(d) allowance. The Commission further reasoned in that opinion that for purposes of §441a(d), the runoff election was merely "a continuation of the general election campaign." Advisory Opinion 1983-16 (emphasis added). Accordingly, the Commission found that §441a(d) expenditures could be made during the runoff, albeit subject to a single limit corresponding to the earlier general election. This reflected a common sense recognition that, in some situations, parties might choose to reserve some or all of their §441a(d) spending authority for a possible post-general election runoff. The Commission allowed what flexibility it could within the parameters of its regulations.

The advisory opinion issued herein by a 5-1 vote, specifies that "there is no practical difference between the situation presented in Advisory Opinion 1983-16 and the situation presented in Texas." Advisory Opinion 1993-2 at 3. To the undersigned, that means that the earlier opinion is "indistinguishable in all its material aspects" and may be relied on as legally conclusive. 2 U.S.C. §437f.

In sum, we believe that the Commission regulations and Advisory Opinion 1983-16 require the conclusion reached. We do not believe that the regulations or the precedent of Advisory Opinion 1983-16 can be considered superfluous or revoked without a four vote majority.

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2. In so finding, the Commission specifically superseded an opinion of counsel (OC 1976-7) issued by the Commission's General Counsel on February 13, 1976, concerning the application of §441a(d) to a special election in Texas. The opinion of counsel had concluded that the special election was not equivalent to a general election.

The fact that OC 1976-7 was superseded by Advisory Opinion 1983-16 could have served as guidance on the state of the law as it pertains to the Texas situation. The requestor in the present matter probably witnessed the Commission's odd deadlock recently regarding Advisory Opinion 1992-39 (Georgia Senate election), and concluded that confirmation of the Commission's apparent position was advisable.

II.

Two of our colleagues, Commissioners Aikens and Elliott, believe that the May 1 election in Texas was not a general election but rather a primary election. In their opinion, it is the runoff election which operates as the general election. For that reason, they argue that only one §441a(d) limit is appropriate for the Texas special election. Although we agree with them as to the result, i.e., a single §441a(d) limit, we disagree strongly with their reasoning.

We do not believe that the May 1 election in Texas can be viewed as a primary election. Rather, we think the Commission regulations and precedent establish that the May 1 election was a general election. As we discussed, supra, at p.3 , the 11 C.F.R. 100.2(b)(2) definition of general election clearly covers the May 1 election. Moreover, Advisory Opinion 1983-16, which contains "no practical difference" from the facts presented in Texas (see Advisory Opinion 1993-2 at 3), plainly establishes that the May 1 election should be viewed as the "general election and not as a primary election." See discussion, supra, at p.3.[3]

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3. Commissioners Aikens and Elliott now label Advisory Opinion 1983-16 as "superfluous...non-binding and erroneous." See Statement of Commissioners Aikens and Elliott on Advisory Opinion Request 1992-39. We do not accept the argument that the rationale of Advisory Opinion 1983-16 is erroneous and somehow stole upon an unsuspecting Commission. Indeed, the issue of whether a special election should be considered a primary election was specifically considered and rejected by the Commission in Advisory Opinion 1983-16. The Commission passed Advisory Opinion 1983-16 on June 9, 1983, by a vote of 5-1. Commissioners Aikens, Elliott, Harris, McDonald and McGarry voted affirmatively for the rationale and result of the opinion, and Commissioner Reiche dissented. According to Commission minutes:

> Commissioner Reiche noted his disagreement with the Opinion's conclusion that the special election was a general election. While acknowledging that the special election had some characteristics of a general election, he voiced his belief that it more closely resembled a primary election in view of the candidacy of more than one member of at least one major party and the California statute providing for a subsequent runoff election which, by way of contrast, clearly would have all the earmarks of a general election.

Minutes of a Regular Meeting, June 9, 1983 (emphasis added).

In addition, the May 1 special election fails to satisfy any of the conditions detailed in 11 C.F.R. 100.2(c) for the definition of primary election. For example, the term "primary election" is defined to include an election "held prior to a general election, as a direct result of which candidates are nominated, in accordance with applicable State law, for election to Federal office in a subsequent election...." 11 C.F.R. 100.2(c)(1) (emphasis added). Yet, that test clearly is not met in the Texas situation since candidates were not being nominated for a subsequent election; indeed there was the possibility that there may not be a "subsequent election" in the form of a runoff. Moreover, this definition of "primary" recognizes that the function of the primary is only to nominate a party's candidate for the general election; a primary does not fill a public office -- that is the role of the general election. See 11 C.F.R. 100.2(b)(2). Since the May 1 election did not involve party nominations and could serve to elect a candidate to the United States Senate, it plainly was not a primary; rather, it was a general election.[4]

We suspect our colleagues argue that the May 1 election was actually a primary election in order to somehow rationalize their peculiar vote regarding Advisory Opinion Request 1992-39 involving the 1992 Georgia Senate election. Having voted previously for the result and reasoning set forth in Advisory Opinion 1983-16 (a runoff following a general election does not warrant an additional coordinated expenditure allowance), Commissioners Aikens and Elliott nonetheless voted to permit the parties a second coordinated spending allowance for the Georgia Senate runoff. But, labeling the special election in Texas as something it is not, does not justify naming the Georgia runoff as something it is not.

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4. Commissioners Aikens and Elliott, having strained to call the May 1 election a primary, then fall back on Advisory Opinion 1984-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5766, for the proposition that §441a(d) expenditures nonetheless could be made before the May 1 election. We think there is a simpler way to explain the making of §441a(d) expenditures during this period: the May 1 election was the general election.

Commissioners Aikens and Elliott go on to suggest that the Commission, in Advisory Opinion 1984-15, somehow overturned or weakened Advisory Opinion 1983-16. We think it goes too far to say that because the Commission provided a wide time frame for national party committees to spend §441a(d) funds, the Commission intended to supersede the analysis in Advisory Opinion 1983-16. Indeed, nowhere in Advisory Opinion 1984-15 is Advisory Opinion 1983-16 even cited or mentioned.

Commissioners Aikens and Elliott now have established a record of voting for just about every conceivable position on the discrete issue at hand. Having voted for one §441a(d) limit in the California situation (Advisory Opinion 1983-16), but then for two limits in the Georgia situation (Advisory Opinion Request 1992-39), they then voted for one limit in the Texas situation (Advisory Opinion 1993-2), but for reasons entirely different than those they supported earlier in Advisory Opinion 1983-16. Yet, in each instance the regulations stayed the same; the first election fit the definition of "general election," and the second election did not. Whatever their design, they do not overcome the binding effect of the Commission's regulations and majority-approved precedent.

III.

In their recent Statement of Reasons for Matter Under Review (MUR) 3708 (the enforcement matter arising from the Georgia Senate election), Commissioners Aikens and Elliott make the outlandish allegation that we, the undersigned, have "abandoned" the rationale of Advisory Opinion 1983-16 in Advisory Opinion 1993-2. Statement at 18. They point to the fact that certain language proposed in the General Counsel's draft opinion was not included in the final version approved by the Commission. They then go on to accuse us of being "capricious" for relying on Advisory Opinion 1983-16 in the context of MUR 3708. Not only is their argument misleading and unfair, but its patent intellectual dishonesty threatens to undermine the good faith working relationship which must exist in order for the Commission to resolve the matters which come before it.

Commissioners Aikens and Elliott know full well the circumstances surrounding approval of Advisory Opinion 1993-2. The General Counsel's draft relied upon the rationale of Advisory Opinion 1983-16 for its conclusion that there was only one section 441a(d) limit for the Texas election process. Five Commissioners (Aikens, Elliott, McDonald, McGarry and Thomas) agreed with the result reached in the General Counsel's draft, but only three Commissioners (McDonald, McGarry and Thomas) agreed with the draft's reliance on Advisory Opinion 1983-16. Since the affirmative votes of four members of the Commission are required in order for the Commission to render an advisory opinion, 2 U.S.C. §§ 437c(c) and 437f, and only three Commissioners agreed with the General Counsel's draft, it appeared that no opinion would be issued.

Since five Commissioners agreed on the result, however, we, along with Commissioners Aikens and Elliott, believed that it was important for the Commission to try to issue an opinion on the significant question raised by the requestor. In order to attract the five votes, this meant that the supporting rationale upon which all five Commissioners could agree would be necessarily limited. Indeed, as the General Counsel explained

in a memorandum accompanying the draft which was eventually approved by the Commission with additional deletions: "The second draft, Draft B, is an attempt to reach consensus among the Commissioners by excising much of the legal analysis presented in the agenda documents. . . . The Office of General Counsel recommends Draft B which reaches the same result with a minimum amount of legal analysis and leaves each Commissioner's office free to write a concurring opinion." Agenda Document #93-28 (March 2, 1993) at 1 (emphasis added).

As our concurring statement herein makes clear, supra at 3-4, we believe that Advisory Opinion 1983-16 mandates the result reached in this opinion, as do the Commission's regulations. Obviously, we did not "abandon" Advisory Opinion 1983-16 in Advisory Opinion 1993-2. Nor are we "capricious" for relying on that opinion in MUR 3708. That Commissioners Aikens and Elliott would make these allegations, knowing full well the circumstances surrounding passage of Advisory Opinion 1993-2, is blatant misrepresentation. No doubt, they attempt to sow confusion in order to avoid the fact that they simply do not wish to follow a perfectly valid precedent.

For a six member body such as the Federal Election Commission, the spirit of compromise is especially important. We approached Advisory Opinion 1993-2, as we thought did Commissioners Aikens and Elliott, with that spirit in mind. By twisting our good faith efforts at compromise in this matter in order to create a totally baseless and unfounded argument in MUR 3708, Commissioners Aikens and Elliott have not advanced the spirit of compromise in future matters.

IV.

Consistent with the Commission's regulations, the 5-1 ruling in Advisory Opinion 1983-16, and our position concerning the Georgia election, we conclude that there is only one §441a(d) limitation applicable to the election process in Texas.

5/27/93
Date

Scott E. Thomas
Chairman

5/26/93
Date

Danny Lee McDonald
Commissioner

5/28/93
Date

John Warren McGarry
Commissioner